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Regulatory
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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Alcoholic Beverage Control Board
Virginia Administrative Code (VAC) citation	3 VAC 5 -50
Regulation title	Retail Operations
Action title	New Regulation Prohibiting Disorderly Conduct on Licensed Premises
Date this document prepared	August 30, 2007

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) Please explain why this is an “emergency situation” as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

On August 2, 2007, Judge Walter D. Kelley, Jr., of the United States District Court for the Eastern District of Virginia entered a preliminary injunction, enjoining the Alcoholic Beverage Control Board and its agents from enforcing that portions of § 4.1-225 of the Code of Virginia which prohibits alcoholic beverage licensees from allowing disorderly conduct on licensed premises in Virginia. With enforcement of this Code section enjoined, the board has no provision of law or regulation to address serious public safety

issues on licensed premises. Approximately 20 pending disciplinary cases involving violations of peace and good order had to be continued generally or dismissed because of the injunction. In just the first weekend following the injunction's issuance, three persons were injured, two seriously, in violent events at two of the licensed premises operated by plaintiffs in the lawsuit resulting in the injunction. The emergency regulation lists specific types of dangerous activity which licensees may not allow, or fail to take reasonable steps to prevent, control, and/or end on their licensed premises. It also prohibits a licensee from operating a licensed establishment where violations of the criminal law are so frequent and serious as to constitute a continuing threat to public safety.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Title 4.1 of the Code of Virginia gives the Alcoholic Beverage Control Board general authority to regulate the manufacture, distribution and sale of alcoholic beverages within the Commonwealth, including the authority to promulgate regulations which it deems necessary to carry out the provisions of Title 4.1, in accordance with the Administrative Process Act. The Code mandates that the Board promulgate regulations, but details are left to the Board's discretion.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The planned regulatory action is intended to require alcoholic beverage licensees to take reasonable steps to prevent their establishments from having a serious negative impact on public safety. Consumption of alcohol can impair judgment and cause aggressive behavior. The goal of the new regulation is to mandate that licensees do not allow specific behavior on their premises that presents an unreasonable risk to the health, safety, or welfare of citizens.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

Many studies have shown a correlation between alcohol consumption and the incidence of crime. Each year in Virginia many citizens are injured or killed as a result of fights, assaults, and other criminal or dangerous behavior occurring in or around licensed premises. The board has determined that the proposed regulation is necessary to protect patrons at licensed establishments and the general public from violent crime and other potential dangers to their health, safety, and welfare.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
	3 VAC 5-50-145		<p>No licensee shall permit, or fail to take reasonable steps to prevent, control, and/or end, fighting, conduct involving an unreasonable risk of bodily harm to participants or others, conduct having a direct tendency to cause acts of violence by the person or persons at whom, individually, such conduct is directed, or violations of the criminal laws of the Commonwealth on its licensed premises.</p> <p>No licensee shall operate an establishment where violations of the criminal law on or immediately adjacent to the premises are so frequent and serious as to be deemed a continuing threat to public safety.</p> <p>These provisions are intended to make alcoholic beverage licensees responsible for reasonable steps to prevent public safety violations at the licensed premises.</p>

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

The board has considered taking no action, but does not view that as a viable alternative. The failure to take action leaves no enforceable regulation of these activities, which present an imminent risk to public safety. The board will consider any viable alternatives identified during the development of the permanent regulation, in discussions with the advisory committee and considering public comment received.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

The board is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to **Jeffrey L. Painter, Post Office Box 27491, Richmond, Virginia 23261, telephone (804) 213-4621, fax (804) 213-4411, e-mail jeffrey.painter@abc.virginia.gov**. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public meeting will not be held pursuant to an authorization to proceed without holding a public meeting.

Participatory approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The board is using the participatory approach to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the advisory committee is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

It is not expected that this regulatory action will have any impact on the institution of the family.